

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WILLIAM B.

Petitioner,

vs.

SAN ANDREAS REGIONAL CENTER,

Respondent.

OAH No. N 2006060943

(Early Intervention Services Act
Gov. Code, § 95000 et seq.)

DECISION

Administrative Law Judge Cheryl Tompkin, State of California, Office of Administrative Hearings, heard this matter on July 7, 2006, in Campbell, California.¹

Petitioner William B. was represented by his mother Deborah B. and father Don B.

Jacques Maitre, Director's Designee for Fair Hearings, represented the service agency, San Andreas Regional Center (SARC).

The case was submitted for decision on July 7, 2006.

ISSUES

Whether SARC must provide speech therapy services for petitioner even though the cost of those services exceeds the maximum rate normally paid by SARC.

¹ This matter was originally scheduled for mediation on July 7, 2006, and fair hearing on July 10, 2006. Pursuant to agreement of the parties, the scheduled mediation date was vacated and the matter proceeded to hearing on July 7, 2006.

FACTUAL FINDINGS

1. Petitioner was born July 2, 2004. He was assessed and found eligible for regional center services under the Early Start Program (ESP).

2. An IFSP² was developed on May 9, 2006. Among other things, the IFSP specified that petitioner was to receive individualized instruction from a speech therapist once a week for one hour in the home or in a center. The projected start date was June 9, 2006, continuing through May 9, 2007. SARC was responsible for funding the instruction.

3. On May 16, 2006, petitioner was offered speech therapy services through the Center for Speech, Language and Occupational Therapy (CSLOT). Petitioner's parents refused the CSLOT services because they were provided in a group setting with less than a one-to-one student-teacher ratio. Petitioner's parents feared that he would not receive the attention he needed and did not want to inadvertently waive petitioner's right to individualized speech instruction. In addition, the CSLOT services were only offered three times per week, at times that were very inconvenient for petitioner's family. The speech therapy services through CSLOT are the only speech therapy services that petitioner has been offered.

4. Petitioner's parents would prefer that he receive speech therapy in the home, but they are willing to accept center based individualized speech instruction if it will result in petitioner obtaining services sooner. However, they wish to retain the option to switch to home based instruction if a speech therapist becomes available to provide such instruction.

5. Recently SARC has experienced an unprecedented increase in the demand for services in Santa Clara County and throughout its service area. During the last six months it has received an average of 40 new consumers weekly, most of whom require speech therapy services. SARC has contracted with (vendorized) both agency and individual speech therapy providers. However, all of the vendors SARC currently uses for the provision of speech therapy are completely full and do not have the capacity to deliver individualized services to petitioner. SARC is currently experiencing a crisis in staffing for speech therapy services.

6. SARC funds speech therapy services at the State rate, which was established over five years ago and has not been adjusted to meet inflation. SARC currently pays speech therapist an average of \$100 per hour, which is the third highest hourly rate for speech therapists of any regional center in the state, but SARC has still been unable to meet the demand of its consumer base.

² Under California's Early Start program a regional center must conduct a planning process that results in an individualized family service plan (IFSP) once it is determined that a child is eligible for early intervention services. The IFSP must specify the early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services. (Cal. Code Regs., tit. 17, §52109, subd. (b); see also 20 U.S.C. § 1436, subd. (d)(6).)

7. Jacques Maitre, SARC's Director's Designee for Fair Hearings, testified that SARC agrees it has an obligation to provide speech therapy services to petitioner and that SARC accepts responsibility for its continuing obligation to locate and deliver said services. However, one of the problems SARC has encountered in securing services is the increasing unwillingness of vendors and other potential service providers to accept the State rate, which is typically less than the prevailing rate for speech therapy services. SARC believes that it would have a greater chance of securing speech therapy services for petitioner if SARC had flexibility with the rate of payment. However, it is SARC's position that it cannot pay an amount in excess of the State rate without permission from the Department of Developmental Services (Department), or an order compelling it to do so.

LEGAL CONCLUSIONS

1. Part C, subchapter III of the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.) (IDEA) authorizes federal funding to assist states in maintaining and implementing a comprehensive statewide system to provide early intervention services for infants and toddlers with disabilities and their families. (20 U.S.C. § 1433.) Under this program each state is given the opportunity to receive federal funds to provide services for eligible children from zero to thirty-six months if certain requirements are met. California has chosen to participate and has passed the necessary legislation. California's program is known as "Early Start," and its statute, the California Early Intervention Services Act, is found at Government Code section 95000 et seq. Regulations have also been adopted and are found at title 17 California Code of Regulations sections 52000 through 52175.

2. The California Legislature has found that early intervention services represent an investment of resources, "in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization." (Gov. Code, § 95005, subd. (a)(2).) The Legislature has also recognized that time is of the essence and that "[t]he earlier intervention is started, the greater the ultimate cost-effectiveness and the higher is the educational attainment and quality of life achieved by children with disabilities." (*Id.*) State regulations also stress the need to move quickly. Early intervention services specified in the IFSP are to "begin as soon as possible." (Cal. Code Regs., tit. 17, § 52109, subd. (b).) Regional centers are required to arrange, provide, or purchase such services "as soon as possible" and an infant or toddler is not to be placed on a waiting list for early intervention services required under the IFSP. (Cal. Code Regs., tit. 17, § 52106, subds. (c) & (d).) Regional centers are also the payor of last resort for infants and toddlers determined eligible for regional center services. (Cal. Code Regs., tit. 17, § 52109, subds. (a) & (b).)

3. Government Code section 95004, subdivision (a), provides "Direct services for eligible infants and toddlers and their families shall be provided pursuant to the existing regional center system under the Lanterman Developmental Disabilities Services Act . . . and the existing local education agency system" Under the Lanterman Act a regional center

is authorized to purchase services or supports for a consumer pursuant to “vendorization or contract.” (Welf. & Inst. Code, § 4648, subd. (a)(3)(A).) A regional center may reimburse an individual or agency for services or supports provided to a consumer if the individual or agency has completed the vendorization process. (Welf. & Inst. Code, § 4648, subd. (a)(3)(B).) The rate of reimbursement is limited to “a cost not to exceed the maximum rate of payment for that service or support established by the department.” (Welf. & Inst. Code, § 4648, subd. (a)(4).)

Under the Lanterman Act the Department of Developmental Services is responsible for establishing a process of setting rates for services purchased by regional centers. (Welf. & Inst. Code, § 4690.) Accordingly, when purchasing services under the Lanterman Act, regional centers are not permitted to exceed the rate set by the Department of Developmental Services. Pursuant to Government Code section 95004, subdivision (b)(1), Lanterman Act provisions relating to vendorization and ratesetting also apply to the provision of early intervention services, “except where compliance with those provisions would result in any delays in, or any cost to the families for, the provision of early intervention. . . .”³

4. SARC believes that in order to purchase Early Start services at a cost higher than the maximum State rate it has to receive a rate exception from the Department of Developmental Services. SARC is mistaken. The express language of Government Code section 95004, subdivision (b)(1) only requires compliance with the Lanterman Act provisions relating to vendorization and ratesetting if compliance would not result in any delays in or costs to the family for provision of early intervention services. In this case, SARC has been unable to secure needed services because the maximum State rate is so low. This has resulted in a delay in the delivery of services to petitioner, who has not yet received the speech therapy to which he is entitled under the IFSP. Under such circumstances, SARC is not required to comply with Lanterman Act provisions relating to vendorization and

³ Government Code section 95004, subdivision (b)(1) provides in pertinent part:

In providing services under this title, regional centers shall comply with the Lanterman Developmental Disabilities Service Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, and its implementing regulations (Division 2 (commencing with Section 50201) of Title 17 of the California Code of Regulations) including, but not limited to, those provisions relating to vendorization and ratesetting, except where compliance with those provisions would result in any delays in, or any cost to the families for, the provision of early intervention, or otherwise conflict with this title and the regulations implementing this title (Chapter 2 (commencing with Section 52000) of Division 2 of Title 17 of the California Code of Regulations), or Part C of the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1431) et seq., and applicable federal regulations contained in Part 303 (commencing with Section 303.1) of Title 34 of the Code of Federal Regulations.

ratesetting and may pay a rate that is higher than the State maximum in order to secure services required under the IFSP.

5. Application of the State rate to delay implementation of Early Start services is also inconsistent with legislative intent. The mandate under Early Start is to obtain early intervention services for the disabled child as soon as possible (Cal. Code Regs., tit. 17, §§ 52109, 52106), and no limitations upon the allowable cost of Early Start services are found in federal law.⁴ Subchapter III of IDEA, clearly provides that Early Start services are to be provided at no cost and without limitation, unless federal or state law provides for a system of payments by families, including a schedule of sliding fees. (20 U.S.C. § 1432, subd. (4)(B); see also 34 CFR § 303.13, subd (a)(3)(iv).) As previously discussed, the only restriction on funding imposed by State law is found in Government Code section 95004, and that restriction is inapplicable in cases such as this one where complying with vendorization or ratesetting requirements would result in any delay in the provision of early intervention services. Accordingly, SARC must devote whatever resources are necessary for it to secure the services required under petitioner's IFSP as soon as possible.

6. SARC agrees that the speech therapy services to be provided to petitioner are both necessary and appropriate. The Regional Center has not been able to find a vendor willing to provide those services for petitioner at the State rate. Although the prevailing rate for speech therapy services is higher than the State rate, SARC is bound to pay it in order to enable petitioner to receive the Early Start services to which he is entitled.

ORDER

SARC shall fund the full and actual cost of providing speech therapy services for petitioner without regard to State funding limitations.

DATED: July 20, 2006

CHERYL TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

⁴ Although Early Start services are administered through the regional centers created under the Lanterman Act, neither the substantive provisions of the Lanterman Act nor the regulations implementing it govern the Early Start program. Early Start is a federal program, with federal funding, and is governed by federal law as implemented by the California Early Intervention Services Act and its enabling regulations. (See Gov. Code, §§ 95106-95022; Cal. Code Regs., tit. 17, § 52000 et seq.)